Lawrence KL Chin (practising under the name and style of LC Chartered Architect) v Sri Somaha (S) Sdn Bhd

HIGH COURT (KOTA KINABALU) — NO K22–161 OF 1999–I
DAVID WONG J
18 SEPTEMBER 2009

Contract — Building contract — Consultant — Claim by architect for professional fee for work done as superintendent officer — Whether consultant in breach of contract of engagement — Whether consultant negligent in discharge of duties — Whether consultant acted unreasonably in refusing to certify contractor's claim for expenditure other than construction costs — Whether consultant complied with directions for variations or change to design

Contract — Building contract — Consultant — Whether architect's contract of engagement as superintendant officer an entire contract — Whether contractor not obliged to pay if architect committed fundamental breach — Whether architect entitled to payment for works completed

Professions — Architects — Claim for professional services — Whether architect's contract of engagement as superintendant officer an entire contract — Whether contractor not obliged to pay if architect committed fundamental breach — Whether architect entitled to payment for works completed

The plaintiff, an architect, had entered into a memorandum of agreement ('MOA') with the defendant to provide his professional services as a prime consultant in connection with an agreement entered between the defendant and the State Government of Sabah for the construction of the Ministry of Agriculture complex in Kota Kinabalu. The plaintiff claimed against the defendant the sum of RM2,432,952.90 being professional fees for work done by him. The defendant's defense was basically that the plaintiff had repudiated the MOA in refusing to certify the defendant's claims for expenditures. The issues which arose for determination were, inter alia: (i) whether it was an express and/or implied term that the plaintiff in his capacity as the superintendent officer of the project must certify all claims for expenditures incurred by the defendant other than the construction cost; (ii) whether the plaintiff was in breach of his contract of engagement and/or negligent in the discharge of his duties and professional services; (iii) whether the plaintiff had performed 70% of the scope of work under the MOA at the

time of rescission of the said agreement; (iv) whether the plaintiff had performed part of the contract management phase at the time of the rescission of the said agreement; and (v) whether the MOA was an entire contract for a lump sum with the consequence that the defendant was under no obligation to pay the plaintiff if it was proved that the plaintiff had committed a fundamental breach of the said MOA.

Held, allowing the plaintiff's claim with costs and dismissing the defendant's counterclaim with costs:

(1) There was no express provision in the MOA requiring the plaintiff to certify the defendant's claim for expenses other than construction costs. There was also no implied obligation to certify. The certification of expenses was outside the scope of work under the MOA. There was no express or implied duty on the plaintiff to certify all claims for expenditure incurred by the defendant other than construction costs (see paras 5, 9(b) & 11).

(2) There was no evidence that the plaintiff had not complied with the direction from the defendant for variations or change to design which had been consented by the government. The plaintiff's duty was to follow the original design and any other variations which had been approved by the government. The plaintiff had complied with such variation when it had been approved by the government. As for the allegation of negligence by the plaintiff which may result in claim for damages by the main contractor or the government, there was no evidence that such claims had been made which gave rise to the inference that such negligence did exist or even if it existed the defendant had not suffered any loss (see paras 14–15).

(3) The plaintiff had proved that on the balance of probability he had performed the works in respect of schematic design, design development and contract documentation. As for the contract management phase, it was also beyond doubt that the plaintiff had certified some works for the defendant to make its claim. It was due to plaintiff's refusal to make certain certification that his services were terminated. The plaintiff had performed some works and entitled to say 2.5% as opposed to 5% as claimed (see paras 21–22).

(4) Clause 6.7 of the MOA evinced an intention that the MOA was not an 'entire contract'. Another factor which favored the contention that the MOA was not an entire contract was the defendant's confirmation that the plaintiff's professional fees were to be paid as and when claims by

the defendant to the bank were paid. The MOA was not an entire contract and hence the plaintiff was entitled to claim for works done (see paras 23 & 25).

[Bahasa Malaysia summary

Plaintif, seorang arkitek telah menandatangani memorandum perjanjian ('MP') dengan defendan untuk memberikan perkhidmatan profesionalnya sebagai konsultan utama berhubung dengan perjanjian yang termeterai di antara defendan dan Kerajaan Negeri Sabah bagi membina kompleks Kementerian Pertanian di Kota Kinabalu. Plaintif menuntut terhadap defendan sejumlah RM2,432,952.90 sebagai bayaran profesional untuk kerja-kerja yang dilakukan olehnya. Pembelaan defendan ialah bahawa plaintif telah membatalkan MP tersebut apabila dia enggan mengesahkan tuntutan-tuntutan defendan untuk perbelanjaan. Isu-isu yang timbul untuk ditentukan ialah: (i) sama ada terdapat terma tersurat dan/atau tersirat bahawa plaintif dalam kapasitinya sebagai pegawai superintenden projek perlu mengesahkan semua tuntutan untuk perbelanjaan yang ditanggung oleh defendan selain daripada kos pembinaan; (ii) sama ada plaintif melanggar kontrak perlantikannya dan/atau cuai dalam melaksanakan kewajipan dan perkhidmatan profesionalnya; (iii) sama ada plaintif telah melaksanakan 70% skop kerja di bawah MP tersebut pada masa pembatalan kontrak tersebut; (iv) sama ada plaintif telah melaksanakan sebahagian fasa pengurusan kontrak pada masa pembatalan kontrak tersebut; dan (v) sama ada MP tersebut merupakan kontrak keseluruhan bagi jumlah bayaran sekaligus yang mengakibatkan defendan tidak berkewajipan untuk membayar plaintif sekiranya dibuktikan bahawa plaintif telah melakukan pelanggaran asas ke atas MP tersebut.

Diputuskan, membenarkan tuntutan plaintif dengan kos dan menolak tuntutan balas defendan dengan kos:

(1) Tidak terdapat peruntukan tersurat dalam MP tersebut yang memerlukan plaintif untuk mengesahkan tuntutan defendan bagi perbelanjaan selain kos pembinaan. Tidak terdapat kewajipan tersirat untuk membuat pengesahan. Pengesahan perbelanjaan adalah di luar skop kerja di bawah MP tersebut. Tidak terdapat kewajipan tersurat dan tersirat ke atas plaintif untuk mengesahkan semua tuntutan untuk perbelanjaan yang ditanggung oleh defendan selain kos pembinaan (lihat perenggan 5, 9(b) & 11).

(2) Tidak terdapat keterangan bahawa plaintif tidak mematuhi arahan daripada defendan untuk variasi atau perubahan ke atas rekaan yang dibenarkan oleh pihak kerajaan. Kewajipan plaintif ialah untuk

mengikut rekaan asal dan mana-mana variasi lain yang dibenarkan oleh pihak kerajaan. Plaintif telah mematuhi variasi tersebut apabila ia telah diluluskan oleh pihak kerajaan. Bagi tuduhan kecuaian oleh plaintif yang berkemungkinan mengakibatkan tuntutan ganti rugi oleh kontraktor utama atau kerajaan, tidak terdapat keterangan bahawa tuntutan tersebut telah dibuat di mana ini menimbulkan inferens bahawa kecuaian tersebut memang wujud atau sekiranya wujud, defendan tidak mengalami sebarang kerugian (lihat perenggan 14–15).

(3) Plaintif telah membuktikan atas imbangan kebarangkalian dia telah melaksanakan kerja-kerja berkenaan rekaan skematik, perkembangan rekaan dan dokumentasi kontrak. Bagi fasa pengurusan kontrak, ia juga tidak diragui bahawa plaintif telah mengesahkan kerja-kerja bagi defendan membuat tuntutannya. Ini berpunca daripada keengganan plaintif untuk membuat pengesahan yang membuatkan perkhidmatannya diberhentikan. Plaintif telah melaksanakan kerja-kerja dan berhak untuk mengatakan 2.5% berbanding 5% sepertimana yang dituntut (lihat perenggan 21–22).

(4) Klausa 6.7 MP menunjukkan bahawa MP tersebut bukan bertujuan sebagai 'entire contract'. Salah satu faktor yang berpihak kepada hujahan bahawa MP tersebut bukanlah kontrak keseluruhan ialah pengesahan defendan bahawa bayaran profesional plaintif perlu dibayar sebagai dan apabila tuntutan-tuntutan oleh defendan kepada bank dibayar. MP tersebut bukan merupakan kontrak keseluruhan dan oleh itu plaintif berhak untuk tuntutan kerja-kerja yang telah dilakukan (lihat perenggan 23 & 25).]

Notes

For cases on architects generally, see 10 *Mallal's Digest* (4th Ed, 2008 Reissue) paras 1570–1595.

For cases on building contract generally, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 2753–2955.

Cases referred to

MP-Bilt Pte Ltd v Oey Widarto [1999] 3 SLR 592, HC (refd)
Thomas v Hammersmith Borough Council [1938] 3 All ER 203, CA (refd)
Workman, Clark & Co Ltd v Lloyd Brazileno [1908] 1 KB 968, CA (refd)

Chin Yuen Fong (Chin Lau Wong & Foo) for the plaintiff.
Norbert Yap (Jayasuriya Kah & Co) for the defendant.

David Wong J:

PROCEEDING

[1] The plaintiff is an architect who had entered into a memorandum of

agreement ('MOA') with the defendant to provide his professional services as a prime consultant in connection with an agreement entered between the defendant and the State Government of Sabah for the construction of completion of the Ministry of Agriculture complex in Kota Kinabalu. The complex's costs amounted to RM61,317,500 which shall be paid to the defendant by way of transfer of certain parcels of land of equivalent value. The plaintiff is claiming against the defendant the sum of RM2,432,952.90 being professional fees for work done by him.

[2] The defendant's defense is basically that the plaintiff had repudiated the MOA in refusing to certify the defendant's claims for expenditures on 4 February 1998.

[3] At this juncture it should be mentioned that this case had been part heard by one of the previous resident judges in that several witnesses had already testified. Be that as it may, it was agreed by the litigants and their counsel that I continue with the hearing of the case on the condition that I can make inferences from the evidence of the witnesses who had already testified. It is thus under this circumstance that I am hearing this case.

ISSUES

[4] Counsel had agreed that the following issues be adjudicated by the court:

(a) whether it is an express and/or implied term and condition of the engagement of the plaintiff that the plaintiff in his capacity as the superintendent officer of the project must certify all claims for expenditures incurred by the defendant other than the construction cost;

(b) if the answer to issue No 1 is in the affirmative, whether the plaintiff was in repudiatory breach of the said obligation when he unilaterally decided not to continue to certify the said claims on 4 February 1998;

(c) whether the plaintiff was in breach of his contract of engagement and/or negligent in the discharge of his duties and professional services as itemised in para 20 of the defendant's defence;

(d) whether the rescission of the contract of engagement by the defendant on 10 February 1998 was wrongful;

(e) whether the plaintiff has performed 70% of the scope of work under the memorandum of agreement dated 3 March 1997 at the time of rescission of the said agreement;

(f) whether the plaintiff has performed part of the contract management phase at the time of the rescission of the said agreement;

(g) whether the memorandum of agreement was an entire contract for a lump sum with the consequence that the defendant is under no obligation to pay the plaintiff if it is proved that the plaintiff has committed a fundamental breach of the said memorandum of agreement;

(h) in the event that the plaintiff is found to be in breach of his obligations to the defendant which justifies the defendant rescinding the agreement, whether the defendant is entitled to set-off the loss and damages incurred/suffered by the defendant consequent upon the plaintiff's breach and if so, how much.

DELIBERATION OF ISSUES

Issue No 1: Whether it is an express and/or implied term and condition of the engagement of the plaintiff that the plaintiff in his capacity as the superintendent officer of the project must certify all claims for expenditures incurred by the defendant other than the construction cost

[5] It has been conceded by both counsel that there is no express provision in the memorandum of agreement dated 3 March, 1997 requiring the plaintiff to certify the defendant's claim for expenses other than construction costs. The task before the court is to determine from the conducts of the litigants whether there was such an implied obligation to certify. The defendant's counsel, Mr Norbert Yap submitted that the plaintiff had, by virtue of two letters dated 25 February 1997 and 19 March 1997, agreed to do such certification and had in fact done so. These two letters together with the plaintiff's subsequent conduct gave rise to an implied agreement to certify the expenses. That is the crux of Mr Yap's contention. The exact words used in the two letters are hereby reproduced below.

[6] In the letter dated 25 February 1997 the relevant words were:

5. All other claims for expenditure other than those in the contract sum will be submitted by your company to your financial institution/bank in the acceptable form/format, and the SO will sign on it to confirm that to the best of his knowledge the expenses claimed were for the implementation of the Project.

[7] As for the letter dated 19 March 1997 the words used were:

> 4. In the consortium, Jurukos Bina Quantity Surveyors will submit Valuation Certificates and LC Chartered Architect will issue Certificate for Payment in accordance with the Contract Sum under the Main Contract and the nominated Sub-Contract. However as required under your Banker's Contract Sum that are prepared and submitted by Sri Somaha (S) Sdn Bhd by confirming that to the best of their knowledge the items claimed were costs for the implementation of the project.

[8] Plaintiff's counsel, Mr Chin Yuen Fong submitted that since the MOA had not provided for such obligation, the plaintiff is not obliged legally to certify for claims for expenditure other than construction costs.

[9] Having considered the submissions, I am of the view that the plaintiff had no such legal obligation to certify and my reasons are as follows:

(a) The words used in the letters which Mr Yap referred to, as quoted, 'to the best of their knowledge' in my view infer that should the plaintiff feels that he is not comfortable with the expenditure claims submitted by the defendant he is entitled to refuse to certify such claims. It is not insignificant that the claims are prepared by the defendant for the purpose of drawdown on their banking facilities. It is understandable that the plaintiff saw such obligations as onerous as he did not want to be a party to mislead the bank and rightfully it is based on this belief of deception that led to the plaintiff's refusal to continue to certify such claims.

(b) The certification of expenses is outside the scope of work under the MOA.

(c) In exh P38, which is a letter from the defendant to the plaintiff expressing dissatisfaction on the defendant's refusal to certify expenses claims, the defendant said that the certification of expenses was a condition precedent for the appointment of the plaintiff. The relevant paragraph reads as follows:

> The requirement to certify administrative and supervisory expenses incurred by our office is not a requirement arising from us. As our prime consultant and having been fully involved with this project at its initial stage of negotiation with the Government you ought to know that the Privatization Contract dated 1 October 1998 contains a list of total development expenses amounting to RM61.7 million that we are allowed to be claimed by our company. Your firm has been named in the aforesaid as the certifier for the said list of expenses. At no time prior to the signing of this contract or your appointment as Prime Consultant have you raised any objection to the certification. You have therefore accepted this duty as part and parcel of this

> 1st land — swap privatization project in Sabah State; and *it is on this basis* that we appointed you as the Prime Consultant subsequent to the signing of the said privatization contract. (Emphasis added.)

[10] If indeed that was the basis of the plaintiff's appointment I find it amazing and unprofessional not to have this condition expressly set out in the MOA. What we have in this case is not certification of amounts totaling in hundreds but millions of ringgits. Such condition precedent for appointment in any business dealing would be fully set out in the MOA.

[11] For the reasons stated above, I find that there was no express or implied duty on the plaintiff to certify all claims for expenditure incurred by the defendant other than construction costs.

Issue No 2: If the answer to issue No 1 is in the affirmative, whether the plaintiff was in repudiatory breach of the said obligation when he unilaterally decided not to continue to certify the said claims on 4 February 1998 and

Issue No 4: Whether the rescission of the contract of engagement by the defendant on 10 February 1998 was wrongful

[12] In view of my answer to issue No 1, there is no necessity for me to deliberate on these two issues.

Issue No 3: Whether the plaintiff was in breach of his contract of engagement and/or negligent in the discharge of his duties and professional services as itemised in para 20 of the defendant's defence

[13] The answer lies in cl 17(a) of the privatisation agreement which specifically provides as follows:

> All plans, drawings and specifications including any changes to be made thereto in relation to the Development and Building Plans and Specifications for the Building Complex must first be *consented to by the Government* before submission to the Relevant Authority or implementation by the Company. (Emphasis added.)

[14] There is no evidence in court that the plaintiff had not complied with the direction from the defendant for variations or change to design which had been consented by the government. The plaintiff's duty under that clause is simple. He must follow the original design and any other variations which had been approved by the government. Counsel for the plaintiff had rightly pointed out that the plaintiff had complied with such variation when it had

been approved by the government and that is in respect of the change to the phone system from PABX to TMCentrex system.

[15] As for the allegation of negligence by the plaintiff which may result in claim for damages by the main contractor or the government, there is no evidence that such claims had been made which gives rise to the inference that such negligence did exist or even if it existed the defendant had not suffered any loss.

Issue No 5: Whether the plaintiff has performed 70% of the scope of work under the memorandum of agreement dated 3 March, 1997 at the time of rescission of the said agreement and

Issue No 6: Whether the plaintiff has performed part of the contract management phase at the time of the rescission of the said agreement

[16] These two issues concern whether the plaintiff had completed the following phases of works, namely:

Phase	Fee for percentage phase	Percentage cumulative total fee
1. Schematic Design	15%	15%
2. Design Development	30%	45%
3. Contract Documentation	25%	70%
4. Contract Management	30%	100%

[17] It is the contention of the plaintiff that he had completed schematic design, design development, contract documentation and part of contract management phases. The relevant evidence was that of PW4, an independent architect called by the plaintiff to enlighten the court the nature of the various phases of works. This contention is of course rebutted by the defendant through the evidence of DW2, the architect who replaced from the plaintiff after his contract was terminated.

[18] PW4 in his evidence defined what the abovementioned phases meant as follows:

> Q.2 Can you tell the court, what is the Schematic Design Phase?
>
> A The main aim of the Schematic Design Phase is to get the client to accept the preliminary design proposal prepared by the architect. It is a preliminary design intention. The architect will prepare the overall development of a project in skeletal form together with rough estimates of costs. All these are done as preliminary in order for the client to decide whether to commit to do the project.

Q.3 Can you tell the court, what is the Design Development Phase? A

A The main aim of the Design Development Phase to prepare detail drawings to comply with local authorities requirements and to obtain their approval e.g. building plan approvals from Dewan Bandaraya Kota Kinabalu. This stage is done after the client has approved the Schematic Design Phase. The architects and his consultants e.g the engineers and quantity surveyors will proceed with this phase by inputting more details to the dimension, engineering inputs and costing. This is done so that all building working drawings can be comprehensively prepared for further costing and detailing. All these are done sufficiently for the submission to the local authorities for their approval and feed back. B

Q.4 Can you tell the court what is the Contract Documentation Phase? C

A The main aim in Contract Documentation Phase is that after the Building Plans have been approved, the prime consultants have to compile contract documents and drawings from all consultants and to call for tender/quotation for the award of the building contract. The Contract Documentation Phase is to set out the construction details and specifications of materials to be used. These can be put in drawings. These details are meant for pricing, such drawings would contain specification of materials. This will enable the engineers to complete the drawings for the ongoing works. The quantity surveyors to complete the quantification of works all of which will become part of the tender documents. In this phase, tenders for works will be called. A contract document is a document prepared in the Contract Documentation Phase which includes the description of works, pricing and rates for obtaining quotation from contractors with aim of awarding this contract to the successful contractor. D E

Q.5 Can you tell the Court what is the Contract Management Phase? F

A The Contract Management Phase only happens when there's an award of tender and the contract documents are signed. In this phase, the contractor will commence work and the architect will go and inspect the works periodically (not to supervise). The Main Contractor will then submit claims for work done and the architect with his consultant's help will verify the claims and later certify for works done. This certification is progressive with the works done (usually monthly) and based on the valuation of works done by the quantity surveyor. G

[19] DW2's evidence is basically that the plaintiff had assumed that the above phases had been completed when in fact they were not. H

[20] Having reviewed the testimonies together with other documentary evidence I prefer the evidence of PW4 and my reasons are as follows: I

(a) There is no dispute that the design development plan and the building plans had been approved by MPKK.

(b) DW2 in his evidence never challenged what was said by PW4 in respect of his understanding of what the four phases meant.

(c) In my view, DW2 did not challenge the significance of the approval of the plans by MPKK which the plaintiff placed much reliance on for his case.

(d) Common sense dictates that substantial amount of works must have been completed before MPKK would approve the plans.

(e) One significant factor in the evidence of PW4 and DW2 is that PW4 is an independent witness in the sense that he had no interest in the project while DW2 is the architect who took over from the plaintiff and also employed by the defendant.

[21] As there is no dispute that there is in existence an agreement between the defendant and Borneokaya Development Sdn Bhd, I find that the plaintiff had proved that on the balance of probability he had performed the works in respect of schematic design, design development and contract documentation.

[22] As for the contract management phase, it is also beyond doubt that the plaintiff had certified some works for the defendant to make its claim. I say that for the reason that it is due to plaintiff's refusal to make certain certification that his services were terminated. How much work had been done? I cannot say with certainty that he had performed 5% work as claimed in the statement of claim. However I am willing to find that he had performed some works and entitled to say 2.5% as opposed to 5% as claimed.

Issue No 7: Whether the memorandum of agreement was an entire contract for a lump sum with the consequence that the defendant is under no obligation to pay the plaintiff if it is proved that the plaintiff has committed a fundamental breach of the said memorandum of agreement

[23] The answer to this question depends on the construction of words employed in the MOA. In my view cl 6.7 of the MOA evinces an intention that the MOA is not an 'entire contract' and I say that because of the words employed therein. It states as follows:

> If the Work is abandoned or the services of the Consortium is terminated during any phase of services under this Agreement the Consortium is to be paid only for the service performed and on account of its prior receipt or written notice from the Employer of such abandonment or termination.

[24] In the case of *Thomas v Hammersmith Borough Council* [1938] 3 All ER 203 the Court of Appeal had to consider a clause similar to cl 6.7 and found that the architect was entitled to his fees up to the stage when the

project was abandoned and to be paid for the work done by him. In *Thomas*' case, the clause in question was cl 5 which states, inter alia:

> If the project or part of it be abandoned, or if the services of the architect cease or are dispensed with before a contract is entered into or order given, the charges in respect of the works abandoned or for which the architect was employed (as the case may be) …

[25] Another factor which favors the contention that the MOA is not an entire contract is the defendant's confirmation that the plaintiff's professional fees are to be paid as and when claims by the defendant to the bank are paid. This is clearly stated in cl 7 of a letter from the defendant dated 9 August 1997 to the plaintiff (exh P33). In *MP-Bilt Pte Ltd v Oey Widarto* [1999] 3 SLR 592, GP Selvam J referred and adopted the rationale of the case of *Workman, Clark & Co Ltd v Lloyd Brazileno* [1908] 1 KB 968. This is what he said:

> In *Workman, Clark & Co Ltd v Lloyd Brazileno* [1908] 1 KB 968 the plaintiffs by a contract agreed to construct a ship. The agreed price was £89,800. It was payable in five instalments based on the completion of different stages of construction. When the first instalment fell due after due performance by the plaintiffs, the defendants failed and refused to pay it. They sought judgment under O 14 for the instalment amount on the ground that it was for 'a debt or liquidated demand in moneys'. The defendants objected that it was not a claim for 'a debt or liquidated demand as money'. They said that when a sum is payable in instalments an action of debt would not lie for one or more instalments before the whole is due — that is until the entire performance is completed. It was argued that the claim arising upon default in payment of such an instalment was a claim for damages and not a liquidated sum. The objection was overruled by the Master, the judge [*603] and the Court of Appeal. It was held that the claim was for 'a debt or liquidated demand for money'. It was not a claim for damages.
>
> Farwell LJ said at pp 977–978:
>
> > I agree that, upon the true construction of this contract, it contains separate promises to pay five several sums on the happening of five several events. If that be so, it can make no difference that all the promises are contained in one document. But, even if, on its true construction, it must be regarded as one contract to pay the whole of the sum named as the price of the ship by five instalments, each instalment is to become due and payable upon the happening of the particular event specified in that behalf by the contract, eg the first instalment is to become payable upon the laying of the keel of the ship. In my opinion the claim for that instalment upon the happening of that event is a liquidated demand in money within the meaning of O III r 6: It has been argued that technically the claim arising upon default in payment of such an instalment is a claim for damages, and not for a liquidated sum. I confess that I cannot follow this argument.

Lord Alverstone CJ in giving judgment explained the logic of the decision at pp 974–975:

> It is, however, suggested that, by reason of some rule of law to be deduced from the old authorities as to the action of debt, or the principle upon which they were founded, the claim in this action is not for a 'debt or liquidated demand in money' within the meaning of O III r 6. I cannot take that view. One knows that, in the case of contracts of this kind, eg contracts for the construction of ships or buildings, where the contractor has to incur heavy expenditure for labour and materials to be used in the work contracted for, it is the practice to insert provisions, such as were inserted in the present case, for payment of the contract price by instalments as the work proceeds, and I cannot understand why, or on what principle, the claim for such an instalment, when it becomes due according to the terms of the contract, should not be regarded as 'a liquidated demand in money' within the meaning of O III r 6. It seems to me to answer exactly to the description contained in the rule as being a liquidated demand in money payable by the defendant under an express contract. The suggestion made, as I understand it, was that, because, in such a case, the shipbuilder, still having the ship, so far as she is built, in his hands, may be later on, if the purchaser finally makes default in carrying out his side of the contract, be in a position to dispose of the ship, possibly at a profit, the claim in respect of this instalment must be one for unliquidated damages only, and therefore is not within the words of the rule. I am unable to assent to this suggestion. It seems to me clear, from a business and common-sense point of view, that, if, in consideration of the shipbuilder's finding materials and labour and carrying out the work of building the ship up to a certain stage, the purchaser agrees, when the work has reached that stage, to pay him a certain sum in cash, that is an express contract to pay a liquidated sum in that event, and within the meaning of the rule, and that it makes no difference in principle that four other instalments of the price of the work are subsequently to become payable on other events. I think that this contract is for the present purpose to be regarded as an express contract to pay five different liquidated sums of money upon five different events.

It follows that since the present claim is for a debt and not for damages no question of mitigation of damages can arise.

[26] For reasons stated I find that the MOA is not an entire contract and hence the plaintiff is entitled to claim for works done.

Issue No 8: In the event that the plaintiff is found to be in breach of his obligations to the defendant which justifies the defendant rescinding the agreement, whether the defendant is entitled to set-off the loss and damages incurred/suffered by the defendant consequent upon the plaintiff's breach and if so, how much

[27] As I have found that the plaintiff did not breach his obligations in the MOA, there is no necessity to deliberate on this issue.

CONCLUSION

[28] For all the reasons set out above, I make the following orders:

(a) Judgment for the plaintiff in the sum of RM2,233,423.50, particulars are as set out in para 17 of the statement of claim.

(b) Judgment for the plaintiff in the sum of RM99,764.70 (2.5% for the contract phase), the details/calculation is as follows:

2.5% x RM3,800,560	RM95,014
Add service tax 5%	RM 4,750.70
Fees due	RM99,764.70

(c) Discretionary interests at the rate of 3% on both the judgment sums from 28 March 1998 to the date of this judgment.

(d) Statutory interest at the rate of 8%pa on both the judgment sums from the date of judgment to the date of full payment.

(e) Costs to the plaintiff to be taxed unless agreed to the plaintiff.

[29] As for the defendant's counterclaim and also for the reasons set out above, it is dismissed with costs to be taxed unless agreed to the plaintiff.

Plaintiff's claim allowed with costs and defendant's counterclaim dismissed with costs.

Reported by Kanesh Sundrum